In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-856

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS, As Executor of the Estate of Althea Shutts, Individually, and as representative of all that class of gas royalty owners under Phillips Petroleum Company oil and gas leases in the Hugoton-Anadarko area,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

*W. LUKE CHAPIN
CHAPIN AND PENNY
P. O. Box 148
Medicine Lodge, Kansas 67104
Attorneys for Respondents

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*Counsel upon whom service is to be made.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas and of the trial court are as recorded in the Petition. In addition, the trial court's class order and notice is attached hereto as an Appendix.

JURISDICTION

The jurisdictional requirements are as set forth in the Petition for Certiorari.

QUESTION PRESENTED

The federal question, if any, is: Whether it is a violation of Phillips' due process or equal protection rights for nonresident members of plaintiff class to be included in the benefits of a Kansas state court judgment against Phillips.

STATUTE INVOLVED

K.S.A. §60-223, the Kansas class action statute, as set forth in the Appendix to the Petition, 1a to 3a. K.S.A. 60-266 is not involved here. It simply says: "This article (on civil procedure in Kansas) shall not be construed to extend *or limit* the jurisdiction of the District Courts or the venue of actions therein." Phillips apparently reads this statute as though it says only that the article shall not extend jurisdiction. Not so. "Article II was drafted with the intention of avoiding any conflict with the statutes dealing with jurisdiction and venue, and (K.S.A. 60-266) makes explicit the disclaimer of any attempt to do so." (Vernon's Kansas Statutes Annotated, Comments on §60-266.) §60-266 has nothing to do with this case.[1]

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1. Vernon's Comments further reads: "This rule is substantially the same as Federal Rule 82. . . . 'Thus Rule [60-266] provides in simple terms that jurisdiction and venue of the District Courts, which are regulated by other statutory provisions, are unaffected by Article II and the rules therein. It has thus been said:

> ". . . Rule 82 dispels any doubt that the [federal] rules of civil procedure must be viewed through a jurisdictional latticework externally constructed." *Healy* v. *Pennsylvania R. R.*, CA.3d 1950, 181 F.2d 934, 935'."

STATEMENT OF THE CASE

This is one of four cases in which major oil and gas producing companies are seeking review of opinions of the Supreme Court of Kansas finding the companies liable for interest on gas royalties *suspended and used* by the companies pending Federal Power Commission opinion and approval of the opinion. The other cases are:

Gulf Oil Corporation v. *Maddox, et al.*, No. 77-798;

The Superior Oil Company v. *William J. Sterling, et al.*, No. 77-847;

Northern Natural Producing Company and Mobil Oil Corporation v. *Hazel Nix, et al.*, No. 77-848.

Until June 1, 1961, Phillips had paid over to its gas royalty owners in the Hugoton-Anadarko area all of their share (approximately 1/8th royalty share) of the increased rates being collected by Phillips for gas sales, as well as their royalty share of so-called firm proceeds from the sale of gas. However, "Beginning June 1, 1961, Phillips management decided to begin withholding all of its royalty owners' share of increased gas prices subject to refund, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased prices were not approved by the FPC." (*Shutts, et al.* v. *Phillips Petroleum Company*, Appendix 29a.)

The Hugoton-Anadarko area is a gas production area as defined for rate making by the Federal Power Commission and it consists of all of the State of Kansas, and certain parts of the States of Oklahoma and Texas.[2]

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2. The Hugoton-Anadarko area is defined more specifically in 18 C.F.R. §154.106(g). The geographical boundaries of gas producing areas do not recognize state lines. For instance, the Hugoton field, named after Hugoton, Kansas, extends into both Oklahoma and Texas.

Plaintiff Shutts filed this action individually and as representative of that class of gas royalty owners under defendant Phillips oil and gas leases in the Hugoton-Anadarko area. Shutts is a resident of Kansas, and he owns royalties under Phillips' leases in Texas and Oklahoma. (*Shutts*, 27a.)

The increase in gas rates collected by Phillips went into Phillips' corporate treasury and was commingled with its other corporate funds and used by Phillips, without ever giving notice of this fact to its royalty owners. (*Shutts*, 30a.)

FPC Opinion No. 586 was entered on September 18, 1970, approving most of the rate increases filed. The validity of FPC Opinion No. 586 was challenged in the courts and finally sustained on October 28, 1972. (*Shutts*, 30a, 31a and 32a.) Subsequently, in about December, 1972, approximately 6,400 persons and firms constituting Phillips royalty owners in the Hugoton-Anadarko area were paid about $5,700,000.00 in additional royalties due them by virtue of the finality of FPC Opinion No. 586. (*Shutts*, 32a.)

Notice was sent with such FPC suspense royalty checks which discloses "Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips." (*Shutts*, 32a.)

As to portions of the suspended rates not approved, Phillips was under contractual duty to refund the same to its gas purchasers, "with interest at the rate of seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out. . ." (18 C.F.R. §154.102 (c) and FPC Opinion No. 586, page 33; as quoted at *Shutts*, 28a.)

FPC has no jurisdiction over amounts paid to gas royalty owners[3] and had no regulations covering interest due gas royalty owners on FPC suspense royalty payments.

On May 1, 1975, the trial court granted plaintiffs' Motion for a Class Order, and all members of the class were served with notice by first class mail and by publication.[4]

Ordinarily, if a question of jurisdiction would be raised as to nonresident members of plaintiff class, it would be raised by a nonresident member in the court of another state, after judgment against the plaintiff class. However, in this case, Phillips attempts to raise the question of jurisdiction of the Kansas courts over nonresident members after judgment in favor of plaintiff class, in order to save itself from paying a substantial part of the judgment against it.

Statutes of limitation have run against the payment of interest on the FPC suspense royalties in Oklahoma and Texas.[5] Royalty owners in the Hugoton-Anadarko area are not entitled to go into the federal court and bring a class action because many of the claims are less than $10,000.00.[6] This leaves the Kansas court as the only forum and the Kansas Court's judgment in this case as the only possibility of nonresidents of Kansas obtaining interest on the FPC royalty funds here involved.

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted

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3. *Mobil Oil Corp.* v. *Federal Power Commission*, 463 F.2d 256 (D. C. Cir.), cert. denied, 406 U.S. 1976 (1972).

4. See Appendix attached to this Brief for full copy of Class Order and of Notice.

5. See *Shutts*, 40a.

6. See *Shutts*, 39a and cases there cited.

as to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

REASONS FOR NOT GRANTING THE WRIT

I. The Kansas Court's Decision Granting Interest Was in Line With All Applicable Law.

Phillips has not raised any federal question pertaining to the allowance of interest. Be that as it may, the Kansas Court's decision allowing interest in this case is fully supported by a U. S. Supreme Court case[7] and by all other applicable law. The trial court allowed interest on the basis that Phillips would be unjustly enriched if it were allowed to use royalty owners' money without paying interest on the money so retained and used.

The Supreme Court of Kansas affirmed on the unjust enrichment theory and further found and held that:

> "What is significant is these gas royalty suspense monies never did or could belong to Phillips." (*Shutts*, Appendix 55a.)
>
> "Phillips made substantial profit during the years 1961-1973. The net profit ranged from $113,000,000.00 to $132,000,000.00 during the period in question and stockholders' equity increased from $1,205,000,000.00 in 1962 to over $1,749,000,000.00 in 1971." (*Shutts*, Appendix 55a.)
>
> ". . . We do not believe that Phillips may enrich itself in the absence of any contractual sanction or

7. *United Gas Improvement Co.* v. *Callery Properties Inc.*, 382 U.S. 223, 15 L. Ed. 2d 284, 86 S. Ct. 360.

> seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." (*Shutts*, Appendix 56a.)
>
> ". . . If Phillips chose to withhold the payments of contractually owing 'suspense royalties' pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the price received with interest for the period of time the suspense money was held and used by Phillips." (*Shutts*, Appendix 57a.)
>
> "Furthermore, the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United Gas* v. *Callery Properties*, 382 U.S. 223, 15 L. Ed. 2d 284, 86 S. Ct. 360.)" (*Shutts*, Appendix 57a.)
>
> "We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit . . . if the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8%, interest to the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts*, Appendix 59a.)
>
> "Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present." (*Shutts*, Appendix 60a.)

"In passing we also note a long line of federal cases have concluded Texas law permits—and equity required—the award of interest on suspense royalties under similar circumstances. (*Phillips Petroleum Company* v. *Adams*, 513 F.2d 355, 365 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *First Nat. Bank of Borger* v. *Phillips Petroleum Co.*, 513 F.2d 371 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *Phillips Petroleum Co.* v. *Riverview Gas Compression Company*, 513 F.2d 374 [5th Cir. 1975], cert. denied, 423 U.S. 930, 46 L. Ed. 2d 259, 96 S. Ct. 281; *Phillips Petroleum Co.* v. *Hazlewood*, 534 F.2d 61 [5th Cir. 1976]; *Fuller* v. *Phillips Petroleum Co.*, 408 F. Supp. 643 [N.D. Tex. 1976]; and *Phillips Petroleum Co.* v. *Hazlewood*, 409 F. Supp. 1193 [N.D. Tex. 1975].)" (*Shutts*, Appendix 56a.)

It follows that the award of interest by the Kansas Supreme Court is in accord with the decisions of this Court and all other courts that have considered the allowance of interest on FPC suspense royalties. The award of interest involves no federal question and was eminently fair and just.

II. Phillips' Royalty Owners in the Hugoton-Anadarko Area Constitute a Fixed and Definite Class, Having Contacts With Kansas.

Phillips asserts the class includes nonresidents having "absolutely no contract with the State of Kansas." (Petition, 3.) Not so. Whether or not "minimum contacts" are necessary for plaintiff class jurisdiction, the many contacts that tie this certain group of Phillips royalty owners together are enumerated in the *Shutts* opinion, 52a, 53a, as follows:

"The names, addresses and suspense royalty amounts for each of the royalty owners were readily available in Phillips' records. In fact, the class is more manageable with nonresidents of Kansas included because Phillips would be required to take an extra step in separating nonresident royalty owners in its records. *Phillips treated all royalty owners in the Hugoton-Anadarko area alike, regardless of residency, particular lease provisions or royalty agreements.* (See Phillips' notices to royalty owners heretofore quoted as stipulated by the parties herein.) Actually, it would be difficult to imagine a more manageable plaintiff class action.

"Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common interest in the money collected by Phillips as 'suspense royalties' from the sale of gas in the designated area. It was the same FPC regulation that caused and permitted Phillips to collect the 'suspense royalties' and the same FPC Opinion No. 586 pursuant to which the 'suspense royalties' were paid out to the royalty owners in the area. All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the 'suspense royalties' by Phillips, payable as interest, and they have a contact with Kansas by reasons of such common interest."

III. "Fair Play and Substantial Justice" Require That Nonresident Class Members Be Allowed to Keep Their Judgment.

Phillips opens its brief with a rather rash statement:

> "For the first time in the United States, a state court has attempted to exercise in personam jurisdiction over a nationwide plaintiff class in which 96% of the class members were nonresidents of and had no contact whatsoever with the forum state." (Petition, 6.)

First, this is not a nationwide plaintiff class. It is restricted to (1) gas royalty owners under Phillips oil and gas leases, (2) those certain gas royalty owners whose leases to Phillips are within the State of Kansas or parts of Oklahoma and Texas (the Hugoton-Anadarko area) and (3) only those Hugoton-Anadarko Phillips lessors who elected to stay in the class action, after first class mail notice, by failing to write a letter of exclusion to the Clerk of the Court within a certain time.

Second, this is not the first time that a state court has exercised such jurisdiction over a multi-state plaintiff class. Other instances are spelled out in the *Shutts* opinion, 42a.[8]

Third, a substantial number ". . . 218 of the (class members) were residents of Kansas . . . the record is barren as to the number in the plaintiff class residing in other states who have gas leases with Phillips covering

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8. *Chance* v. *Superior Court*, 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849; *Darr* v. *Yellow Cab Co.*, 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732; *Horst* v. *Guy*, 211 N.W.2d 723 (N. Dak. 1973); also, see *Payle* v. *Coca-Cola Company*, 389 Mich. 583, 209 N.W.2d 232 (1973); and *Holstein* v. *Montgomery Ward & Co., Inc.*, CCH Pov. L. Rptr. §9, 652 (1968-71 transfer binder) at 10, 784 (Ill. Cir. Ct. 1969).

land in Kansas, which encompasses the largest portion of the Hugoton-Anadarko area." (*Shutts*, 32a.) And Shutts, the named plaintiff, also represented Oklahoma and Texas royalty owners because his royalties were located in those states. (*Shutts*, 27a.)

Fourth, whether or not any "minimum contacts are necessary, this group of Phillips' Hugoton-Anadarko area royalty owners is tied together and with the State of Kansas by many contacts set forth in the preceding section II of this brief.

Phillips goes on to argue that *International Shoe Co.* v. *Washington*, 326 U.S. 310, setting forth rules applying to nonresident *defendants*, also applies to nonresident members of plaintiff class. Phillips says that the requirement is that there be "certain minimum contacts with (the state) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Petition, 6.) Traditional notions of fair play and substantial justice will be offended only if the interest judgment to which they are rightly entitled is taken away from class members by the Phillips subterfuge that it would be a denial of the due process of law *to Phillips* to require it to pay interest to nonresident members of plaintiff class. Phillips does not quarrel with the fact that the Kansas court has *in personam* jurisdiction over Phillips and the right and authority to require it to pay interest.

The meaning of the words "due process" and "fair play and substantial justice" evidently escapes Phillips. Due process has been afforded to members of plaintiff class. They have elected to stay in the action and not "opt out" after first class mail notice. Fair play and justice can only be afforded nonresident members of the plaintiff class by allowing them the benefit of their judgment against Phillips—not by taking it away from them.

IV. The Kansas Court's Decision Is Consistent With the Decisions of This Court and With Established Law.

Phillips concedes that: "A nonresident plaintiff may bring an action against a defendant in any state which can properly assert jurisdiction over the defendant." (Petition, 10.) But Phillips argues that the nonresident plaintiffs in this case have not taken any affirmative action to submit themselves to the jurisdiction of the Kansas court.

This argument is contrary to the whole theory of Federal Procedural Rule No. 23 as amended in 1966 and to the Kansas statute, K.S.A. 60-223 which was amended and patterned after Federal Rule No. 23 in 1969. (See K.S.A. 60-223, the class action statute, at Appendix to the Petition, 1a to 3a.) Provisions in both the Federal Rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. Phillips apparently is arguing that the "opt out" procedure as compared to the former "opt in" procedure is not proper.

The Kansas court in *Shutts*, Appendix 39a, referred to the new Federal Rules of Civil Procedure as amended in 1966 and pointed out that such rules allow a judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. The same is true of the Kansas rules.

The propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. This is because there is a difference in the jurisdictional standards governing class actions and other actions. In *Hansberry* v. *Lee*, 311 U.S. 32, this court found:

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party. . .

"To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it . . .

"Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . ." 311 U.S. at 40-2. (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded.[9]

This was provided here and Phillips challenges neither the method of notice nor the form or quality of representation.

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9. See page 140 of *Appleton Electric Co.* v. *Advance-United Expressways*, 494 F.2d 126, where it is said: "The notice and exclusion provision of Rule 23 (c) (2) were designed to 'fulfill requirements of due process to which the class action procedure is of course subject.' 28 U.S.C., Rule 23, Advisory Committee's Note at 302. The clearest statement of those requirements is in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be 'informed that the matter is pending and [have the opportunity] to choose for himself whether to appear or default, acquiesce or contest.' 339 U.S. at 314, 70 S. Ct. at 657. The kind of notice mandated in *Mullane* is exactly the kind of notice defendant class members will receive in this case . . . The members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*."

In *Advertising Specialty National Ass'n* v. *Federal Trade Commission*, 238 F.2d 108, 120 (1st Cir. 1956), the court found foreign members bound by a judgment in a proper class suit even though outside the jurisdiction.

Many commentators have considered the question raised by Phillips. They support the Kansas court's decision on the issue. Professor Chafee in *Some Problems of Equity*, 258 (1950) notes the Restatement of Judgments "gives the court where a class action has been properly brought jurisdiction to bind unnamed members, even if not personally within the jurisdiction of the court." Likewise, Professor Moore in his treatise, 3B Moore's Federal Practice, ¶23.11 (5), in discussing the 1928 Federal Rules of Civil Procedure 23 indicates:

> "The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

The Restatements are also in agreement. The Restatement of Judgments states:

> Section 26: Representative or Class Actions.
>
> "Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Tentative draft number 2 of the Restatement (Second) of Judgments §85 (April 15, 1975) provides:

> "(2) A person represented by a party to an action is bound by the judgment even though the person

> himself does not have notice of the action, is not served with process, or is not subject to the service of process."

See also, Note, "Consumer Class Action of a Multi-State Class: A Problem of Jurisdiction," 25 Hast. L. J. 1411, 1432, 1435 (1974);[10] and 30A C.J.S. *Equity* §1456 (4) at 124.

This Court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder* v. *Harris*, 394 U.S. 332, the Court noted class actions premised on *diversity* of citizenship can "most appropriately be tried in state court" (Id. at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the courts of their own state." (Id. at 340.) (See, also *Zahn* v. *International Paper Co.*, 414 U.S. 291.) This led the court in *Shutts* to question, at 40a, "[i]f the state courts will not hear the matter, who will grant relief?" See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366.

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10. 25 Hastings Law Journal, 1411, pages 1432 and 1435: "A class action must proceed in the absence of almost every class member. Therefore, ultimately, the residential makeup of a class is unimportant. What is important is that the rights of absent members be justly protected and that members be given an opportunity to be heard if they so desire. These are the essential elements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residences of the absent class members. Therefore, whereas the essential jurisdiction over a nonresident *defendant* is some tangible connection between him and the forum state, the *element necessary to the exercise of jurisdiction over plaintiff classes is procedural due process.* (Emphasis supplied.) (Page 1432.) . . . .

"It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts *can* exercise jurisdiction over a class action regardless of the citizenship of the class members." (Page 1435.)

Judge Morris E. Frankel noted:

> "If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the [class action] rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 F.R.D. 45, 46.)

Separate suits in each of the states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Phillips is merely attempting to eliminate or diminish its liability through a subterfuge.

V. State Court Decisions Are Based on the Facts and Can Be Reconciled.

Phillips argues that state court opinions are in conflict on the question of jurisdiction over plaintiff classes because there is one Pennsylvania case and one New Jersey case opposed to the *Shutts* opinion. There is no contradiction in the holding of various state courts as to the law. Both the Pennsylvania and New Jersey cases were discussed in *Shutts* (44a to 46a) and held inapplicable for reasons there stated.[11]

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11. (a) Re: *Klemow* (Pa.): "It is apparent the Pennsylvania statutory language is completely at variance with the Kansas statutory language." See *Shutts* at 45a, and the sharp difference in the Pennsylvania statute as compared to Kansas where it is said in the Pennsylvania statute as to a class action:

". . . the judgment in such action shall not impose personal liability on anyone not a party hereto."

(b) Re: *Feldman* v. *Bates* (N.J.): "An excellent example of a *factual situation* in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman* v. *Bates Mfg. Co., supra.*" (*Shutts*, 52a.)

(c) For state cases involving multi-state classes, see note (8) this brief, supra.

VI. Phillips Used the Royalty Owners' Money.

Phillips contends that its royalty owners had no gas to sell and no interest in the proceeds of sale. (Petition, 16.) The Kansas court answered this mistaken contention very well as follows:

> "What is significant is these gas royalty suspense monies never did or could belong to Phillips." (Appendix to Petition, 55a.)

> "It is important to note that during this period of time (June 1, 1961, to October 1, 1970) *Phillips had no entitlement to the gas royalty owners' share of the 'suspense royalties' whether or not the rates were approved by FPC.* Phillips never owned the money. . . . That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners or back to Phillips' gas purchasers with interest, or part to one and part to the other." (*Shutts*, 30a.)

It was Phillips that had no interest in the royalty share—the FPC suspense royalties—not the royalty owners as argued by Phillips.

VII. Common Fund Cases Are Analogous to This Case.

On the question of including nonresident class plaintiffs, the Kansas court considered the so-called "common fund" cases and held them to be analogous to this case.[12]

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12. *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662, 59 L. Ed. 1165, 35 S. Ct. 692; *Royal Arcanum* v. *Green*, 237 U.S. 531; *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356; *Sovereign Camp* v. *Bolin*, 305 U.S. 66; *Carpenter* v. *Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761, affirmed sub nom. *Neblett* v. *Carpenter*, 305 U.S. 297, rehearing denied, 305 U.S. 675; and see *Shutts*, 46a to 48a.

The Kansas court, in *Shutts* 47a, said:

"The 'common fund' cases, which seem to be universally accepted, are closely analogous to the case at bar. Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of 'FPC suspense money' with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings. . .

"Had Phillips put the 'suspense royalties' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalties' to fulfill its business obligations. In this matter the 'suspense royalties' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense of innocent gas royalty owners." (Citing *Perlman* v. *First National Bank of Chicago*, 15 Ill. App. 3d 784, 305 N.E.2d 236 which held:

". . . there seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets.")

Phillips concedes that the "common fund" cases are correct holdings (Petition, 16), but attempts to distinguish the facts. Actually, the facts cannot be successfully distinguished and the Kansas court has correctly ordered a common interest fund to be paid over to the Phillips' royalty owners.

VIII. Answers to Phillips' Other Claims.

Phillips claims that "in fact each royalty owner's claim can be adjudicated separately without affecting the rights of any others." This theory of "divide and conquer" has been Phillips' theory of trying the lawsuit. In order to decrease liability, Phillips would like to limit the lawsuit either to the named plaintiff only, or to his co-lessors and royalty owners. Failing that, Phillips would like to limit it to the so-called "designated area" of one county in Oklahoma and two counties in Texas where Shutts has his royalties. Failing that, they would like to limit it to residents of Kansas only. The Kansas trial court and Supreme Court correctly limited the class to Phillips' gas royalty owners in the Hugoton-Anadarko area.

Phillips, by seeming to argue the case as though the judgment were unfavorable to plaintiff class, attempts to present a hypothetical case that does not exist. Phillips is not arguing for nonresident class members but for itself. The Kansas court judgment granted to members of the class everything they filed suit to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate his claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim the forum court will find he was not bound by the Kansas court judgment.

This brief represents both residents and nonresidents in opposition to the Petition for Certiorari. The nonresident members do not want to relitigate. They do not

want Phillips arguing "for" them. They want to be left in the case and have the benefits of their judgment.

Phillips further argues that there is a provision in K.S.A. 60-223 not included in Federal Rule of Civil Procedure 23 that gives the District Court authority to deny exclusion (Petition, 19, Note 12) thereby making the notice provisions ineffectual. This is a moot question. No member of plaintiff class in this case made timely request to be excluded who was not excluded. (Trial Court's Conclusion of Law No. 10, 9a.)

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. Luke Chapin
Chapin and Penny
P. O. Box 148
Medicine Lodge, Kansas 67104
Attorneys for Respondents

January, 1978

APPENDIX

CLASS ORDER AND ORDER FOR NOTICE

(Filed May 2, 1975)

ON the 5th day of March, 1975, this matter comes regularly on for hearing on defendant's Motion to Dismiss as to all members of plaintiff class not residents of Kansas and plaintiff's Motion to Certify as a Class Action. Plaintiff appears by his attorneys, W. Luke Chapin, of Chapin & Penny, Medicine Lodge, Kansas; and the defendant appears by its attorneys, Joseph Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas, and T. L. Cubbage II of Amarillo, Texas.

THEREUPON, the motions are presented and argued to the Court. Thereafter, the matter having been briefed by counsel and memorandum opinion and requested findings of fact and conclusions of law having been submitted by counsel for the parties, and the Court having read the briefs and requested opinions, findings and conclusions and having examined the pleadings and files herein, and having heard the arguments of counsel, and being well and fully advised in the premises, files his memorandum opinion herein dated March 31, 1975, which is made a part hereof by reference and further finds that this action should be maintained as a class action; and the Court further specifically finds as follows:

1. The proposed class of parties plaintiff is extremely numerous and exceeds some 6,600 members and an actual joinder of all of such members is totally impracticable.

2. The Hugoton-Anadarko area consists of all of the State of Kansas and certain counties of Texas and Oklahoma.

3. The plaintiff's claim is typical of the claims of all the members of the proposed class except that each owner may be entitled to a different amount of interest or damages; and the damages to each of the owners, if allowed, would be too small to enable each owner to file a separate action.

4. The prosecution of separate actions by individual members of the proposed class would create a risk of adjudications with respect to such individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to such adjudications and might substantially impair or impede their ability to protect their interests.

5. The proposed class of plaintiffs are royalty owners and own their interests in the Hugoton-Anadarko area under oil and gas leases with defendant Phillips Petroleum Company.

6. The only questions of law and fact are common to the entire proposed class of plaintiff-royalty owners in that the sole issue appears to be whether defendant Phillips is liable for interest or damages on the money received by it from purchasers of gas and withheld by defendant Phillips pending approval of the Federal Power Commission for a period from June 1, 1961, through December 7, 1972.

7. The plaintiff alleges a claim which has substantial possibility of success providing the Court is persuaded of its merits.

8. The plaintiff is represented by counsel who can adequately represent the entire class and the plaintiff will himself adequately represent the entire class.

9. The questions of fact and law common to the members of the proposed class dominate over any questions affecting separate individual members and a class action appears to be superior to any other available means for a fair and efficient adjudication of the controversy.

10. This action should be certified as a class action under K.S.A. 60-223 as to all of defendant Phillips' gas royalty owners in the Hugoton-Anadarko area. The Court specifically defines that the plaintiff class in this case is as follows:

> "All persons who were in or before 1973, entitled to gas royalties (excluding overriding royalties not owned by gas royalty owners) under oil and gas leases owned by Phillips Petroleum Company, on lands in the Hugoton-Anadarko area and who received on December 7, 1972, and in 1973, payment of royalties attributable to price increases collected by Phillips subject to possible future refund in the event of disapproval by the Federal Power Commission, Phillips having paid such royalties or the increased prices on December 7, 1972, and in 1973 to the extent finally approved by the F.P.C. in its Opinion No. 586."

11. Notice should be given to all members of the class entitled to gas royalties during the period June 1961 through October 1, 1970 (the time involved when gas price increases were withheld by Phillips pending final approval of the Federal Power Commission).

12. Notice of the pendency of the action, its nature and effects of any judgment shall be given to all members of the class as follows:

a. Each member of the class as herein defined whose name and address is contained in defendant's

records shall be notified of the pendency and ultimate legal effect of the action and of the right to request exclusion by sending each class member a notice in form to be approved by the Court.

b. Such notices shall be sent to all such persons as are currently receiving royalty payments by the defendant. The defendant shall send and include such notice in the next royalty payment disbursed to such persons; and such notices shall be sent no later than the June 1975 royalty payment. Such notices may be sent by defendant in separate envelopes from the royalty payments if preferred by defendant. The defendant shall defray the costs thereof; however, any additional costs required to comply with this judgment shall be considered to be and shall be taxed as costs herein.

c. The plaintiff shall prepare a sufficient number of notices to be included in all of the mailings of the defendant as set forth in paragraph a. above and such notices shall be included in the royalty payments as aforesaid (or in separate envelopes if preferred by defendant). Any costs of additional labor or postage shall be defrayed by the defendant and shall be certified to the Clerk of the Court, the same to be taxed as costs herein.

d. In the event that there are members of the class who are not receiving royalty payments from the defendant at the present time, the defendant shall furnish to the plaintiff the names and addresses of said persons and the plaintiff shall cause to be sent a copy of such notice to such persrons by U. S. mail, the costs thereof to be defrayed by the plaintiff and the same to be taxed as costs herein.

e. The plaintiff shall cause a notice by publication to be given pursuant to K.S.A. 60-307, such publication to be once each week for three consecutive weeks in a newspaper of general circulation in each of the following cities: Amarillo, Texas; Liberal, Kansas; Elkhart, Kansas, Guymon, Oklahoma; Oklahoma City, Oklahoma; Wichita, Kansas; and Hutchinson, Kansas. The plaintiff shall advance the costs thereof and such costs shall be certified to the Clerk herein as costs. The notices as aforesaid shall in no case commence later than June 15, 1975.

14. Defendant's Motion to Dismiss is hereby overruled.

15. The Court further finds that this order certifying the class involves a controlling question of law; namely, the jurisdiction of this Court as to all members of the class, and to which there is substantial ground for difference of opinion; and that an appeal from the order certifying the class will materially advance the ultimate termination of the litigation, and the implementation of this order is stayed pending such interlocutory appeal, provided that the same is promptly taken by the defendant as provided by law.

IT IS BY THE COURT SO ORDERED.

ENTERED by the Court on the 1st day of May, 1975.

IN THE
DISTRICT COURT OF KIOWA COUNTY, KANSAS

No. 5309

IRL SHUTTS, as Executor of the Estate of
Althea Shutts, Individually and as Representative of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

NOTICE OF CLASS ACTION SUIT

TO: All persons who were in or before 1973, entitled to gas royalties (excluding overriding royalties not owned by gas royalty owners) under oil and gas leases either owned by Phillips Petroleum Company or under which Phillips accounted for and made royalty payments, on lands in the Hugoton-Anadarko area and who received on December 7, 1972, and in 1973, payment of royalties attributable to price increases collected by Phillips subject to possible refund in the event of disapproval by the Federal Power Commission, Phillips having paid such royalties on the increased prices on December 7, 1972, and in 1973, to the extent finally approved by the F.P.C. in its opinion No. 586.

This suit was filed in September, 1974, by Irl Shutts, Executor, Individually and on behalf of all persons to whom this Notice is directed. He asks judgment against defendant for the payment of interest on royalties paid by defendant in 1972 and 1973 attributable to increased

gas sales prices received and withheld by defendant subsequent to June 1, 1961, or for damages in the form of a share of defendant's profits, if any, for the alleged use of that portion of the increase finally approved by the F.P.C. and in 1972 and 1973 paid by defendant to its royalty owners. The leases involved are in Kansas and in parts of Texas and Oklahoma. There are approximately 6,000 gas royalty owners who are members of the proposed class and the above mentioned payments to royalty owners were in excess of $6,000,000.

Defendant Phillips has denied any liability to the plaintiff or members of the class herein described.

The court has held that this action is to be maintained as a class action. Accordingly:

1. The court will include as members of the plaintiff class herein all of the gas royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Kiowa County, Kansas, Greensburg, Kansas 67054, on or before the 15th day of July, 1975, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if he so desires, may appear in the case in person or through his own counsel; otherwise, Plaintiff's counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

Robert M. Baker, Judge of the
Sixteenth Judicial District.

Chapin & Penny, P.O. Box 148
Medicine Lodge, Kansas 67104
Attorneys for Plaintiff.

T. L. Cubbage, II
Phillips Petroleum Company
P. O. Box 1751
Amarillo, Texas 79105 and

Morris, Laing, Evans, Brock & Kennedy
Suite 430 – 200 West Douglas
Wichita, Kansas 67202
Attorneys for Defendant.